Supreme Court, U.S.
FILED

Case No. 091534

APR 17 2010
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IN THE

**SUPREME COURT OF THE UNITED STATES**

**HECTOR RAFAEL VENDRELL,**

Petitioner,

vs.

**SEC., DEPARTMENT OF CORRECTIONS,**

Respondent.

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On Petition for Writ of Certiorari to the
United States Court of Appeals
Eleventh Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

WHETHER THE COURTS BELOW ERRED IN FAILING TO GRANT A CERTIFICATE OF APPEALABILITY TO PETITIONER?

## CERTIFICATE OF INTERESTED PERSONS

There are no other persons having an interest in this case other than those listed in the caption of the case.

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## PETITION

Hector Rafael Vendrell respectfully petitions the Supreme Court of the United States for a Writ of Certiorari.

## OPINION BELOW

The decision of the Eleventh Circuit Court of Appeals, which declined to issue a Certificate of Appealability is contained in "Appendix A". The order denying Rule 60(b) relief of the District Court is contained in "Appendix D".

## STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the Eleventh Circuit Court of Appeals was entered on January 21, 2010. This petition is timely filed pursuant to SUP. CT. R. 13.1.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE AND FACTS

### A. Preliminary Statement

Hector Rafael Vendrell will be referred to by name or as "Petitioner" throughout this brief. The State of Florida will be referred to as "the State" or as "Respondent" throughout this brief. Record references are cited to the docket sheet entry ("D._") and section and page number from the District Court below.

### B. Factual Background

#### 1. The Indictment

On October 11, 1995, Petitioner was indicted on charges of first-degree murder, armed burglary with an assault, and armed robbery during a home invasion occurring on July 23, 1993. (D.15, A.2-4).

#### 2. Plea Agreement

On November 22, 1995, Petitioner, in exchange for the State's reduction of the charge from first-degree murder to second-degree murder, and in exchange for a recommended sentence of 40 years, agreed to plead guilty to second degree murder, armed burglary, and armed robbery. (D.15, A.5-8).

Petitioner's proffered statement, listed facts to

which he agreed in cooperating with the State[1]:

a. Petitioner and co-defendant, Rayon "Rico" Bernardo (hereafter referred as "Rico") went to the Cinnamon Square Apartment Complex with the intent to commit a robbery;

b. Rico had a gun;

c. Rico tied up and beat the victim, pouring lamp oil on him, threatening to burn him;

d. Rico shot the victim when he attempted to escape; and

e. Petitioner hit the victim, but his participation was minimal and he concentrated on the robbery.

Based upon those facts as read into the record (D.15, A.9-14) ("Transcript 11/22/95), the State offered the plea in exchange for Petitioner's cooperation in testifying against codefendant, Rico.

Additional conditions of the plea agreement specified that the statements made by Petitioner were to be unconditional and truthful, offered without immunity, and that his testimony could be verified by a polygraph examination at the option of the State. The plea also provided that Petitioner and Rico be incarcerated in different prisons for Petitioner's

[1]Petitioner waived his right to a presentence investigation report and offered his full and complete cooperation to the State including, but not limited to, a formal statement regarding his participation in the crimes.

protection. (D.15, A.5-8).

The sanctions that could be imposed in the event that the State determined that Petitioner was not in compliance with the plea agreement were: (Option A) that the sentencing portion of the plea agreement shall be voidable at the demand of the State of Florida; and (Option B) that the plea agreement would be vacated and the parties would be returned to their pre-agreement status.

The plea agreement stated specifically that if the sentencing portion of the plea agreement was voided pursuant to the agreement, Petitioner's plea of guilty would remain in effect and he could be sentenced to life imprisonment for second-degree murder, life imprisonment for armed robbery and life imprisonment for armed burglary, each count to run consecutive to one another.

3. Judgment and Commitment, November 22, 1995
(40 Years Concurrent Imprisonment)

The judgment was entered on November 22, 1995, upon Petitioner's plea of guilty to second-degree murder, armed burglary with assault and armed robbery. Petitioner was sentenced to 40 years imprisonment for each crime, to run concurrently, which would initially be served in a youthful offender facility. (D.15, A.16-19).

The Sentencing Guidelines Worksheet prepared by the State and signed by Judge Rosinek filed in the

record on November 22, 1995, at the time of Petitioner's plea, reflected a recommended sentence of 17-22 years and a permitted sentence of 12-27 years; however, the total sentence actually imposed was 40 years. The Sentencing Guidelines Worksheet did not require that Petitioner undergo a polygraph exam. The reason for departure of the recommended and permitted sentences was to avoid a life sentence with a minimum mandatory sentence of 25 years. (D.15, A.15).

4. The Polygraph Examinations

On December 12, 1995, polygrapher Robert D. Gately submitted his report on polygraph test findings. In this report, Gately stated that in his opinion Petitioner had significant adverse reaction indicative of deception to all of the pertinent test questions. Shortly thereafter, on January 1, 1996, Petitioner completed a second polygraph examination, which the polygrapher concluded there were clear and consistent deceptive responses made by Petitioner. The State subsequently determined that Petitioner had violated the plea agreement based on the opinion of two polygraphers that Petitioner failed to pass the polygraph examinations.

5. The State's Motion to Enforce Plea Agreement

The State, relying on the validity of the polygraph examinations, filed a Motion to Enforce Plea Agreement (D.15, A.20-21), asking the trial court to re-sentence Petitioner to three consecutive terms of

life imprisonment.

6. The Evidentiary Hearing
(Polygraph Reliance)

The State's Motion to Enforce Plea Agreement came on for a hearing on February 23, 1996. There, the trial court heard testimony from the two State's polygraph examiners and noted that the examiners formed opinions that Petitioner was untruthful:

> "And so, **in listening to the two individuals who** held, initiated, gave, **conducted the polygraphs**, the polygraph tests, **their conclusions is the defendant failed and failed**.
> I guess, by definition, the term failed would be similar to that of an individual taking a test, an exam where 60 is passing –and 60 is passing with a D and 59 is failure, 23 is failure, 27 is failure, zero is failure. Anything below 60 is failure. It's just a matter of degree of failure."

(D.16, A.293-294) (bold added).

At the hearing, Petitioner's counsel challenged the "validity" of the polygraphs and the admissibility, unfair prejudice and reliability of the polygraphers' testimony despite the fact that the polygraph examination results were stipulated to in the Plea Agreement, that the same were still completely unreliable, inadmissible and unfairly prejudicial. The

trial court categorized Petitioner's "validity" challenge as "of no consequence here":

> "This Court has at least, once on both sides, agreed that the defendant violated a polygraph test and has disagreed that the defendant violated the rules of an agreement based upon a polygraph test. **But the attorney for the defense**, the defendant, **has been challenging the fact as to the validity, whether or not it is valid or admissible** in trials that has or has not been done since 1923 **is of no consequence here**. An agreement, is an agreement, is an agreement."

(D.16, A.291) (bold added).

The trial court relied on the validity of polygraph testing and on the testimony of the polygraph examiners, to determine Petitioner was untruthful:

> "Your family is here to find out that you were not truthful with them before and that you leave this court little choice. **This Court, has** therefore, **taken** into **consideration, all of the testimony given**, all the arguments of counsel. This Court has taken judicial notice of all the prior proceedings at which it has presided, **and finds** that **you** are **in violation of the plea agreement**. That **you lied from the get-go**."

(D.16, A.295) (bold added).

7. The Amended Judgment (Re-sentencing)
(Three consecutive life terms)

The trial court found Petitioner in violation of the plea agreement, vacated the original forty-year sentence, and re-sentenced Petitioner to three consecutive life terms:

> "As a result of your committing the crimes, coupled with your absolute disregard for honesty, this Court is sentencing you – re-sentencing, under the terms of the agreement, to three consecutive life terms."

(D.16, A.296).

> "I truly believe I was correct. I had the authority to do so, and as a result, I did."

(D.16, A.297).

8. The Direct Appeal

Petitioner appealed to the Third District Court of Appeal. Petitioner's initial brief (A.301-322) argued that the motion filed by the State to vacate the sentence was untimely; that the plea did not specifically provide for the severe sentence imposed. Further, that Petitioner's proffer, the basis of the plea and the plea contract, was not specifically contradicted by any later polygraph results.

The State responded (D.17, A.323-337) arguing that the court properly determined Petitioner was in

violation of his plea agreement wherein he specifically agreed that he would cooperate by providing truthful information and testimony upon which the State could rely in prosecuting codefendant Rico Bernardo. The State further argued that Petitioner had been deceptive in his original proffers of information offered to secure the plea agreement, as well as the subsequent polygraph examinations and proffers of information which were conducted to determine Petitioner's truthfulness. The State argued that upon these findings, the court properly vacated the sentence pursuant to the plea agreement, and resentenced Petitioner in accordance with the terms of the agreement.

On January 22, 1997, the Third District Court of Appeals issued an opinion, *per curiam*, affirming the trial court's final order re-sentencing Petitioner to three consecutive terms of life imprisonment.

Petitioner moved for rehearing on February 5, 1997, and argued that the State's motion to vacate the plea was untimely and should not have been entertained. Petitioner also argued that a comparison of his proffer to those questions that he allegedly failed, demonstrated that those questions were not part of the proffer so that any answers to those questions should not demonstrate a violation of the proffer/plea negotiation. (D.17, A.349-351). Rehearing was denied on February 19, 1997. (D.17, A.352).

9. 28 U.S.C. §2254 Proceeding

Petitioner filed his 28 U.S.C. §2254 motion on December 16, 1997. (D.17, A.353-367). The §2254

motion claimed fundamental error, inter alia, that the State's *fact*-reliance on [*unreliable*] polygraph testing results could not serve as the **substantive** basis for the State's cause of action seeking to establish that Petitioner violated the written plea agreement.

The State responded, asserting that the sentencing court's "factual findings" were fairly supported by the record and entitled to a presumption of correctness. (D.17, A.368-380). According to the State, the sentencing court had meticulously followed the law in hearing the State's Motion to Enforce Plea Agreement (although the trial court found that Petitioner's "validity" challenge to the polygraph results was "of no consequence here.").

Ted E. Bandstra, U.S. Magistrate Judge, entered a Report and Recommendation, (App."F"; D.17, A.381-389), which recommended that the District Court deny §2254 relief. The Magistrate also adopted the re-sentencing court's position that polygraph testing is a reliable way to determine truth or falsehood. Petitioner, through counsel, filed an objection. (D.17, A.390-398).

On August 27, 1998, the District Court denied Petitioner's §2254 Motion. (App. "E"). The District Court adopted the Magistrate's adoption (App. "F") of the re-sentencing court's position that polygraph testing is a reliable way to determine truth.

10. Scientific Community Denounces the Polygraph

In the latter part of 2002, the National Research

Council, the research arm of the National Academy of Sciences ("NAS"), established a Committee to Review Scientific Evidence on the Polygraph. (D.18, A.424).

In 2003, the Committee published its findings in a report titled: *The Polygraph and Lie Detection* (National Research Council, 2003). (D.18, A.425). According to the report, "[t]he field validity of polygraphy has not been established by competent scientific research, nor can it be." (D.18, A. 428).

11. The Rule 60(b) Proceedings

Petitioner filed a Rule 60(b) Motion, through counsel, on March 20, 2008 (D.14). The Motion was directed to the final order entered August 27, 1998 (App. "E", D.11) which denied Petitioner 28 U.S.C. §2254 relief. The Motion relied upon *Gonzalez v Crosby*, 545 U.S. 524 (2005) in challenging the "statutory presumption of correctness" standard applied by the district court in entering final judgment August 27, 1998.[2]

On July 7, 2009, the District Court denied Rule 60(b) relief by written order (App. "D", D.39), finding

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[2]The long and short of it is this: since the scientific community determined that polygraph testing is completely unreliable, **the district court should not have accorded a statutory presumption of correctness to the state court's reliance on the polygraph results.** Thus, without the usability of polygraph results the State would have lacked an evidentiary foundation to move the state court to re-sentence Defendant to three consecutive life sentences (instead of the then-current 40-year term of imprisonment).

that: (a) the motion is a successive petition (p.5); (b) lack of jurisdiction over a successive petition (p.5); and (c) the motion was not filed timely (p.6).

Petitioner moved for reconsideration (D.41), which was denied on August 5, 2009. (App. "C", endorsed order). Petitioner next filed a Notice of Appeal (D.43). The District Court entered an endorsed text order on October 14, 2009 denying Petitioner a Certificate of Appealability. (App. "B"). Petitioner then moved the Eleventh Circuit for a Certificate of Appealability. On January 21, 2010, the Eleventh Circuit declined to issue a Certificate of Appealability. (App. "A").

This timely petition for certiorari review follows.

## REASONS FOR GRANTING THE WRIT

### I. THE DISTRICT COURT DID NOT LACK JURISDICTION BECAUSE THE MOTION WAS NOT A SUCCESSIVE PETITION; CERTIFICATION BY AN APPELLATE COURT WAS NOT REQUIRED.

The motion was not successive because it challenged the "statutory presumption of correctness" standard applied by the district court in entering the final judgment dated August 27, 1998. Had the District Court not relied upon and applied a "presumption of correctness" to the State Court's factual findings and conclusions of law, the district court would have had authority to consider: (1) whether polygraph testing is completely unreliable as

indicated by the Scientific community and the Respondent in its Motion (D.34); (2) whether the polygraph testing results and testimony of the polygraph examiners would have been excludable as Evidence against the Petitioner; and thus (3) whether the State lacked an evidentiary foundation moving the state court to re-sentence the petitioner to three consecutive life sentences (instead of the then-current 40-year term of imprisonment).

Petitioner is not presenting a claim on the merits. The *Gonzalez* case is similar to this case because just like in *Gonzalez*, the District Court misapplied a procedural bar in this case when it denied Petitioner's 28 U.S.C.§2254 Motion to Vacate, Set Aside or Correct by affording a presumption of correctness to the prior court's ruling based on unreliable polygraph evidence. This is a very unusual case with atypical circumstances and Rule 60(b)(6) specifically affords relief from Judgments/Orders upon motion to the Court for any reason justifying relief from the operation of the judgment. The District Court had jurisdiction because Petitioner challenged whether the "presumption of correctness" standard afforded to the prior state court judgment resulted in a procedural bar to petitioner' request for habeas relief.

Respondent acknowledged that polygraphs are unreliable as evidence in its Motion filed June 18, 2009 (D.34). Accordingly, the procedural bar and/or "presumption of correctness" is what Petitioner's Rule 60(b)(6) Motion challenged. *Gonzalez v. Crosby* allows for this very type of challenge in the context of a Rule 60(b) motion which is not considered a successive petition and thus does not require pre-certification by

the Court of Appeals.

In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), this Court held that a motion for relief from judgment, which seeks to advance one or more substantive claims, qualified as a second or successive habeas petition, whereas a motion for relief from judgment, which challenges only a district court's previous ruling which precluded a merits determination –i.e., a denial/dismissal for failure to exhaust, procedural default, or statute-of-limitations bar– was not the equivalent of a second or successive habeas petition. In so holding, this Court explained that:

> Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction – even claims couched in the language of a true Rule 60(b) motion – circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts. §2244(b)(2). The same is true of a Rule 60(b)(2) motion presenting new evidence in support of a claim already litigated: even assuming that reliance on a new factual predicate causes that motion to escape §2244(b)(1)'s prohibition of claims "presented in a prior application," §2244(b)(2)(B) requires a more convincing factual showing than does Rules 60(b). Likewise, a Rule 60(b) motion based on a purported change in the substantive law governing the claim could be used to circumvent

> §2244(b)(2)(A)'s dictate that the only new law on which a successive petition may rely is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." In addition to the substantive conflict with AEDPA standards, in each of these three examples use of Rule 60(b) would impermissibly circumvent the requirement that a successive habeas petition be pre-certified by the court of appeals as falling within an exception to the successive-petition bar. §2244(b)(3).

*Id.* at 2648.[3]

Therefore, the District Court had jurisdiction to hear Petitioner's Rule 60(b)(6) Motion without pre-certification from an appellate court.

## II. THE MOTION WAS TIMELY FILED.

The motion was timely filed within approximately three years from the date of the decision in *Gonzalez v. Crosby*. Petitioner moved for relief within a reasonable time (for Rule 60(b)(6) litigation). See *Klapprott v. United States*, 335 U.S. 601 (1949) (four and a half year delay); *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986) (two year delay). Most of our federal civil causes of action are

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[3]The *Gonzalez* opinion specifically addressed habeas corpus proceedings under 28 U.S.C. §2254.

considered timely when brought within four years. Here, Rule 60(b) relief did not functionally exist to challenge the bar (*i.e.*, the presumption of correctness standard employed) until 2005 when this Court decided *Gonzalez v. Crosby*. In that case, Rule 60(b) relief was applied to challenge a procedural bar in this manner. If four years is the standard of reasonableness, then Petitioner's filing of a Rule 60(b)(6) Motion within three years constitutes timely filing. Furthermore, the State has not been prejudiced by Petitioner's delay in filing this motion.

## III. EXTRAORDINARY CIRCUMSTANCES.

Extraordinary circumstances surround the filing of the motion on behalf of Petitioner. The District Court's order dated July 7, 2009 suggests that the court was not aware of any circumstances justifying the delay in filing this motion (D.39). The undersigned attorney hereby represents there are extraordinary circumstances, as explained below.

### 1. COUNSEL AS PETITIONER'S SISTER

The undersigned attorney is the petitioner's sister. Undersigned counsel is only 18 months older than the petitioner. At the young age of 15, undersigned counsel was able to see that her brother, still a minor, was tricked and unjustly coerced into taking a plea of 40 years without her father being present, signing or consenting to the plea. After having personally seen the lack of fairness, justice and due process in the courtroom at such a young age to her only brother, undersigned counsel undertook

the arduous task of becoming a member of the Florida bar to afford the petitioner the legal representation he so desperately needed. It was due to the injustice that her brother endured that created the need and desire in undersigned counsel to go to law school. There were no attorneys in their family. Undersigned counsel was the first to undertake this career with the sole purpose of seeing that her brother is given justice.

It took many years for the undersigned to complete high school, college, law school, sit for the Florida bar exam, review this very complex/unfair case, research the law, prepare and file the Rule 60(b)(6) motion to correct the unjust incarceration. Undersigned counsel's brother was the driving force and only motivation that undersigned counsel had in becoming an attorney.

2. POVERTY (LACK OF FINANCIAL ABILITY)

Undersigned counsel's parents were poor and did not possess the financial means to hire a competent attorney. The petitioner and undersigned counsel's parents were very poor, barely paying for food and rent to cover the family's basic expenses. They were financially unable to provide the funds necessary to pay exuberant attorney's fees related to the filing and preparation of a defense, much less of a Rule 60(b)(6) motion and the corresponding legal and court fees.

The parents put all of their trust and hope in that their daughter would one day fight on behalf of her only brother and be able to undo the injustice that had been done to their only son. Additionally, this was

the father's dying wish that undersigned counsel be allowed the opportunity to argue her brother's matter before this court. The father's demise happened on June 24, 2009 without seeing his wish come true. This is also continuing motivation for undersigned counsel to present this motion to this Honorable Court.

The fundamental unfairness that occurred to undersigned counsel's brother was that the State utilized the polygraph tests as Evidence Against the Petitioner which were only to be used for cooperation with the State against the petitioner's co-defendant, which Respondent admitted that polygraph evidence is unreliable in its Motion (D.34) and only because a child petitioner and the State signed a plea agreement to take the polygraph that made it ok to use in court against petitioner to take away the 40 years sentence. This is unfair.

The petitioner did everything in his power to tell the truth and the fact still remains that the State did apprehend the co-participant of the crime with the information provided by petitioner as a result of his cooperation, regardless of the polygraph results.

3. LACK OF EDUCATION, LEGAL, MENTAL AND PSYCHOLOGICAL INCAPACITY.

Petitioner was only 14 years old with an eighth grade public education at the time of the incident. At the time of the arrest, subsequent trial, and continuous incarceration, the petitioner did not possess the capacity to do legal research or file any papers on his behalf. Undersigned counsel was able to determine that no one in their right mind would

rightfully agree to serve more time than they needed to without being tricked. By making a guilty plea, her little brother would have to serve only between 12–27 years at a youthful offender facility as per the sentencing guidelines. Instead of just pleading guilty without the plea agreement or cooperation with the State, the petitioner was led and tricked into accepting the State's unilateral plea agreement of which petitioner did not have the capacity to sign without his parent/legal guardian present, and their consent and signature.

The State was fully aware that our parents did not consent to the polygraph examination or to the plea agreement given petitioner's mental psychological state and predicament. The petitioner's parents did not sign the polygraph examination consent and release form, instead, only the child petitioner signed the form, lacking capacity. The petitioner did not have capacity to sign the consent and release form based on lack of legal age and mental and psychological inability. The Petitioner was never given a psychological examination in order to assess mental and psychological capacity.

Clarification of Inaccuracies stated in the Order (D39, pg 3). The evidentiary hearing was held in state court, that is true, but it was held with unreliable evidence which was improperly used against petitioner and said hearing was held without notice to petitioner's legal guardians, our parents and without our parents present at said hearing. Our parents vehemently objected to consent to the polygraph test and to any type of settlement in the case as reflected by the record.

4. THE STATE HAS NOT BEEN PREJUDICED

The State has not been prejudiced by the delay, if any, in filing for relief. Petitioner has been incarcerated in an adult, violent prison, for the last sixteen (16) years.[4] The action was filed in *good faith*.

## IV. THE MAGISTRATE JUDGE PROPERLY SET DOWN PETITIONER'S RULE 60(b) MOTION FOR HEARING ON MANY OCCASIONS.

Magistrate Judge Barry L. Garber set down an evidentiary hearing on Petitioner's Rule 60(b)(6) Motion which was repeatedly continued and reset on more than three (3) occasions. Petitioner was also physically brought down to Miami-Dade County, pursuant to Magistrate Judge Garber's issuance of Writ of Habeas Corpus Ad Testificandum (D.33) which provided in part:

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[4]Indeed, the undersigned attorney believes Rule 60(b) relief is highly important in this case. Courts have broad authority to correct errors and relieve litigants of unjust final judgments under Rule 60(b)(6). "[T]his rule is equitable in origin, and the court may take action appropriate to accomplish justice." *Jackson v. People's Republic of China*, 794 F.2d 1490, 1494 (11th Cir. 1986); *Cano v. Baker*, 435 F.3d 1337, 1342 (11th Cir. 2006) (collecting cases). See generally; *Ervin v. Wilkinson*, 701 F.2d 59, 61 (7th Cir. 1983) (observing that courts have consistently held Rule 60(b) most appropriate "[W]here the moving party has been prevented from presenting the merits of his case"); *United States v. One 1966 Chevrolet*, 52 F.R.D. 459, 462 (E.D. Tex. 1972) ("[s]ince the interests of justice are best served by a trial on the merits, courts give Rule 60 a liberal construction").

> "**It appearing to the Court that a hearing regarding the petitioner** Hector Rafael Vendrell's Motion filed under Federal Rule of Civil Procedure 60(b)(6) for Relief from Final Judgment Order Denying 28 U.S.C. Section 2254 Motion to Vacate, Set Aside or Correct **is necessary**..." (Emphasis, bold added).

The Order (D.38) was entered vacating the referral to the Magistrate Judge Barry Garber without stating any reason or evidence of judicial error or impropriety.

## V. 60(b) RELIEF AND AN EVIDENTIARY HEARING WAS NECESSARY.

An evidentiary hearing was necessary since Petitioner's motion is an attack on the validity of polygraph testing and the resulting constitutional violation that flowed from the elevation of polygraph results to that of facts, which formed the decision to vacate the petitioner's forty (40) year sentence and re-sentence him to three (3) consecutive life sentences. It is the question of whether the prior state court judgment should be entitled to a presumption of correctness under such atypical circumstances and Petitioner maintains that a Rule 60(b)(6) motion can be used in light of these circumstances.

Respondent did not contact Petitioner's counsel pursuant to Local Rules 7.1, prior to filing its Motion (D.34) on June 18, 2009 and neither was Petitioner's counsel given the opportunity to respond to the opposition prior to entry of the Order denying

Petitioner's Rule 60(b)(6) Motion (D.39) (without an opportunity to be heard)[5].

## VI. A RULE 60(b)(6) MOTION FILED IN THE INTEREST OF JUSTICE IS PROPER.

Petitioner was induced and coerced into signing a plea agreement and into taking a polygraph examination without the oversight, approval, permission and consent of his parents while being of minor age. At the time the State requested the petitioner to submit himself to the polygraph examinations, the polygraph exam was only going to be utilized for the purpose of cooperation against the co-defendant. At the time at which the child petitioner agreed to the polygraph, he was only facing a sentence of 12-27 years as per the sentencing guidelines in the record.

Due to Petitioner's mental, emotional lack of capacity and instability, the petitioner was not able to withstand the stress of the jury selection for the trial or undergo the polygraph examinations using trickery and mind game techniques. The Plea Agreement lacked consideration. As a result, the polygraph examination which was unreliable from the very beginning as per Respondent's admission in Motion

[5]The undersigned attorney and her father were scheduled to take a family business trip to Puerto Rico, but her father became terminally ill. The undersigned had to rush her father to the hospital on June 19, 2009. The hearing for July 10, 2009 was reset for July 13, 2009 at 10 AM while undersigned counsel was in the hospital at her father's bedside. The father's demise happened on June 24, 2009.

(D.34), was then utilized by the State as EVIDENCE against Petitioner in the case in order to claim that there was a breach of the plea agreement and withdraw the forty (40) year sentence and implement three (3) consecutive life sentences. This action taken by the State prejudiced the petitioner and was arguably in bad faith and with unclean hands as well as being a double standard where all of the benefits of said examination and plea would exclusively serve the State. Petitioner's Rule60(b)(6) motion was proper in the District Court and filed in the interest of justice to Vacate, Set Aside or Correct the injustice forced upon the child petitioner and his family.

## CONCLUSION

For the foregoing reasons, this Court should GRANT Petitioner a Certificate of Appealability or provide any other relief as is deemed just and proper, if any there be at law.

Respectfully submitted,

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Case No. _____

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# APPENDIX

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**Appendix "A"**
Appellate Order Denying Certificate of Appealability
(January 21, 2010)

**Appendix "B"**
Order Denying Certificate of Appealability
(October 14, 2009)

**Appendix "C"**
Order Denying Motion for Reconsideration
(August 5, 2009)

**Appendix "D"**
Order Denying Rule 60(b) Motion
for Relief from Judgment
(July 7, 2009)

**Appendix "E"**
Order Denying 28 U.S.C. §2254 Motion to Vacate
(August 27, 1998)

**Appendix "F"**
Magistrate's Report and Recommendation;
re: 28 U.S.C. §2254 Motion to Vacate
(July 22, 1998)

**Appendix "A"**

Appellate Order Denying Certificate of Appealability

(January 21, 2010)

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JAN 21 2010
CLERK

# UNITED STATES COURT OF APPEALS

# FOR THE ELEVENTH CIRCUIT

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No. 09-14158-H

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HECTOR RAFAEL VENDRELL,

Petitioner-Appellant,

vs.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
Walter A. McNeil as Director,
STATE OF FLORIDA,

Respondents-Appellees.

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Appeal from the United States District Court for the Southern District of Florida

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ORDER:

Hector Rafael Vendrell moves for a certificate of appealability in order to appeal his Fed.R.Civ.P.

60(b) motion for relief from the judgment denying his habeas corpus petition, 28 U.S.C. §2254. To merit a COA, an appellant must show that reasonable jurists would find debatable both: (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack* v. *McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600 01, 146 L.Ed.2d 542 (2000). Vendrell's motion for a certificate of appealability is DENIED because he has failed to make the requisite showing. *See* 28 U.S.C. § 2253(c)(2); *Slack*, 529 U.S. at 478, 120 S.Ct. at 1600-01.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

**Appendix "B"**

Order Denying Certificate of Appealability

(October 14, 2009)

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 97-4192-CIV-LENARD

**HECTOR RAFAEL VENDRELL,**

Petitioner,

vs.

**HARRY SINGLETARY,** et. al,

Respondents.
_____/

**ORDER DENYING MOTION**
**FOR CERTIFICATE OF APPEALABILITY**

On July 7, 2009, the Court denied Petitioner's Motion pursuant to Fed. R. Civ. P. 60(b)(6), filed on May 20, 2008, as both a successive petition for writ of habeas corpus and untimely. See D.E. 39 at 5.

Petitioner's Motion for Reconsideration (D.E. 41), filed on July 16, 2009, was subsequently denied by the Court on August 5, 2009, due to Petitioner's failure to demonstrate why the Court's July 7, 2009 Order was incorrect. See D.E. 42. On August 13, 2009, Petitioner filed a Notice of Appeal (D.E. 43).

The Court must now determine whether a Certificate of Appealability (COA) shall issue in this

case. See Edwards v. United States, 114 F.3d 1083, 1084-85 (11th Cir. 1997) (citing 28 U.S.C. sec. 2253(c)).

Generally, a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

In his Notice of Appeal, construed by this Court as a Motion for COA, Petitioner has not raised any constitutional claims or otherwise made the requisite showing that reasonable jurists would find the district court's assessment of the Petitioner's constitutional claims in his habeas petition debatable or wrong.

Accordingly, Petitioner's Motion for Certificate of Appealability is **DENIED**, and a Certificate of Appealability **SHALL NOT ISSUE** in accordance with the above analysis and pursuant to 28 U.S.C. sec. 2253(c).

**DONE AND ORDERED** in Chambers at Miami, Florida this 14th day of October, 2009.

Joan A. Lenard

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

**Appendix "C"**

Order Denying Motion for Reconsideration

(August 5, 2009)

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 97-4192-CIV-LENARD

**HECTOR RAFAEL VENDRELL,**

Petitioner,

vs.

**HARRY SINGLETARY,** et. al,

Respondents.
_____/

**ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION**

On March 20, 2008, Petitioner filed a Motion pursuant to Fed. R. Civ. P. 60(b)(6).

On July 7, 2009, the Court denied the Motion pursuant to Fed. R. Civ. P. 60(b)(6) as a successive petition for writ of habeas corpus. (See D.E. 39 at 5.) Additionally, the Court found that, even if the Motion pursuant to Fed. R. Civ. P. 60(b)(6) was not a successive habeas petition, it was untimely. (See id. at 5-6.)

In the instant Motion, Petitioner has failed to demonstrate why the Court's Order dismissing Petitioner's Motion pursuant to Fed. R. Civ. P.

60(b)(6) was incorrect. If Petitioner wishes to file a successive habeas petition, he must obtain an order from the U.S. Court of Appeals for the Eleventh Judicial Circuit, authorizing the district court to consider the motion. 28 U.S.C. §§ 2244(b)(3)(A), 2255(h); In re Blackshire, 98 F.3d 1293, 1293 (11th Cir. 1996).

**DONE AND ORDERED** on this 5th day of August, 2009.

Joan A. Lenard

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

**Appendix "D"**

Order Denying Rule 60(b) Motion
for Relief from Judgment
(July 7, 2009)

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 97-4192-CIV-LENARD

**HECTOR RAFAEL VENDRELL,**

Petitioner,

vs.

**HARRY SINGLETARY,** et. al,

Respondents.
_____ /

**ORDER DENYING MOTION FILED UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b)(6) FOR RELIEF FROM JUDGMENT ORDER DENYING 28 U.S.C. § 2254 MOTION TO VACATE, SET ASIDE OR CORRECT (DE 14)**

**THIS CAUSE** is before the Court on Petitioner's Motion filed under Federal Rule of Civil Procedure 60(b)(6) for Relief from Final Judgment Order Denying 28 U.S.C. § 2254 Motion to Vacate, Set Aside, or Correct ("Motion, D.E. 14). Having reviewed the Motion and record, the Court finds as follows.

**I. Background**

On October 11, 1995, Petitioner was charged with first degree murder, armed burglary with an assault,

and armed robbery relating to a home invasion occurring on July 23, 1993. On November 22, 1995, Petitioner entered a written plea of guilty to the criminal charges. In exchange for the State's reduction of the charge from first degree murder to second degree murder and to a recommended sentence of forty years on each count to run concurrently, Petitioner agreed to enter a plea of guilty to second degree murder, armed burglary and armed robbery, to waive his right to a presentence investigation report, and to offer full and complete cooperation to the State including but not limited to a formal statement regarding his participation in the crimes and Petitioner's testimony against his co-defendant, Rico Bernardo. Additional conditions of the plea agreement specified that the statements made by Petitioner in cooperation with the authorities were to be unconditional and truthful, without immunity, and that his testimony was to be verifiable by polygraph examination at the option of the State.

Petitioner proffered a statement, which formed the basis for the plea agreement and was read into the record by the prosecutor at the plea hearing. Petitioner and his counsel both signed the plea agreement, initialing each and every page on November 22, 1995. Judgment was entered upon the plea of guilty to Count 1, second degree murder as reduced - a life felony, Count 2, armed burglary with an assault - a first degree felony, and armed robbery - a first degree felony. The trial court sentenced Petitioner to a term of forty years for counts 1, 2 and 3 each, to run concurrently and to be served in a youthful offender facility.

A polygraph examination consent and release

form was executed by Petitioner as a condition of the plea agreement on December 7, 1995. An initial polygraph examination was administered by Robert Gately. In the opinion of the polygraph examiner, the defendant was lying to him and his numerical score was "slightly deceptive" on all three relevant questions. Petitioner executed a second polygraph examination consent and release form on January 18, 1996. Detective Thomas W.K. Mote, the second polygraph examiner, evaluated the results of the second test; he stated his belief that Petitioner was being deception during that examination, too.

As a result of Petitioner's failure to successfully pass the polygraph examinations, the State filed a Motion to Enforce the Plea Agreement, asking that the trial court sentence the Petitioner to three consecutive terms of life imprisonment pursuant to the plea agreement. There followed at an evidentiary hearing extensive testimony and argument in which Petitioner contended that the State had modified the original "proffer" of information agreed to in the plea agreement thus breaching the agreement and nullifying the results of the polygraph examination which were based on subsequent "proffers" of information. The trial court reviewed the original proffer which formed the basis of the plea agreement in which Petitioner stated that he was not the shooter and his participation in the robbery murder was minimal. The trial court then read the plea agreement into the record specifically indicating that Petitioner and his counsel had agreed to the state's exercise of its options if Petitioner failed to cooperate as detailed in the agreement. Then the trial court reviewed in detail the contradictory proffers made by Petitioner each time he was called upon to cooperate with the

State pursuant to the plea agreement, indicating that the Petitioner changed his story from minimal participation to beating the victim with a miniature bat and actually admitting to being the shooter. The trial court found that Petitioner violated the terms of the plea agreement and upon the State's motion to exercise Option A of the plea agreement, vacated the former sentence outlined in the plea agreement and executed the new sentence outlined therein. Accordingly, on February 23, 1996, the trial court vacated the sentence entered on November 22, 1995, and resentenced Petitioner on counts 1, 2 and 3 to terms of natural life on each count to be served consecutive to each other.

Following his resentencing, Petitioner exhausted his state appeals.

Then, on December 16, 1997, Petitioner filed a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 ("Petition," D.E. 1) in this Court. Petitioner made three claims in his Petition: (1) the State was untimely in its motion to vacate the judgment; (2) the plea agreement did not state with requisite specificity the testimony required by the agreement; and (3) that the plea agreement stipulated that he would be sentenced to 40 years imprisonment with consecutive terms if he failed the polygraph examination. On July 14, 1998, Magistrate Judge Ted Bandstra issued a Report recommending that the Petition be denied (see D.E. 9), and on August 27, 1998, the Court adopted the Report and dismissed the Petition (see D.E. 11).

## II. Discussion

Nearly ten years later, on March 20, 2008, Petitioner filed the instant Motion pursuant to Fed. R. Civ. P. 60(b)(6). Rule 60(b)(6), the catchall provision, authorizes relief from judgment based on "any other reason that justifies relief" Fed.R.Civ.P. 60(b)(6). Rule 60(b) motions challenging the denial of habeas relief are subject to the restrictions on second or successive habeas petitions[1] if the prisoner is attempting to either: (1) raise a new ground for relief, or (2) attack a federal court's previous resolution of a claim on the merits. Gonzalez v. Crosby, 545 U.S. 524, 530-32 (2005). Rule 60(b) may, however, be used to assert that a federal court's previous ruling precluding a merits determination, such as a statute-of-limitations bar, was in error. Id. at 532 n.4.

Petitioner's argument in his Motion is that the State resentencing was based on the questionable scientific validity of the polygraph.[2] The Court finds

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[1]A state prisoner who wishes to file a second or successive federal habeas corpus petition is required to move the court of appeals for an order authorizing the district court to consider such a petition. See 28 U.S.C. 2244(b)(3)(A).

[2]Petitioner framed the issue in his Motion as follows:

> Whether the Order Denying 28 U.S.C. §2254 Relief is Subject to Vacatur when the District Court adopted the resentencing Court's Absolute Bar to challenging the validity of the polygraph testing where the Scientific Community has published credible studies holding Polygraph testing is, in fact, inherently unreliable and where, but for the resentencing Court's reliance on the inherently unreliable Polygraph test results and polygraphers' testimony, Hector would not have been prejudiced and thereby exposed to

that the Motion unquestionably argues a new ground for relief and is therefore a successive petition. "Without authorization [from the court of appeals], the district court lacks jurisdiction to consider a second or successive petition." Farris v. United States, 333 F.3d 1211, 1216 (11th Cir. 2003) (per curiam). As Petitioner has not sought permission from the Eleventh Circuit to file a successive petition, the Court lacks jurisdiction to hear the instant Motion.

Furthermore, even if the instant Motion was not a successive habeas petition, the Court would still deny it as untimely. Motions under Rule 60(b)(6) must be filed within a "reasonable time...after the entry of the judgment or order." Fed.R.Civ.P. 60(c)(1). When determining if a motion was made within a reasonable time, a court should consider the circumstances of the case, including whether the parties were prejudiced by the delay and whether the movant has presented a good reason for failing to take action sooner. BUC Int'l Corp. v. International Yacht Council Ltd., 517 F.3d 1271, 1275, 1276 (11th Cir. 2008).

The Court finds that Petitioner's Rule 60(b)(6) motion was not filed within a reasonable time after entry of the order denying his Petition. Nearly ten years elapsed between the denial of his Petition and the filing of the instant Motion. Petitioner does not cite any recent change in the case law which would explain the delay, nor does Petitioner offer any other explanation for the nearly ten year delay in filing the

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vacatur of his 40 year term of imprisonment and resentenced with a harsher term of three consecutive life sentences?

(D.E. 14 at 7.)

instant Motion. The Eleventh Circuit has concluded that denial of Rule 60(b)(6) motions under these circumstances is appropriate. See, e.g., Ramsey v. Walker, 304 Fed. Appx. 827, 829 (11th Cir. 2008) (holding that district court did not abuse its discretion in denying Rule 60(b) motion when petitioner filed the motion more than six years after the denial of his § 2254 petition and two years after the cases on which he relied were decided), and Solomon v. United States, 300 Fed. Appx. 857, 858-859 (11th Cir. 2008) (holding that, by waiting nine years and failing to provide any explanation for the delay, the petitioner failed to file his motion for relief within a reasonable time).

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Petitioner's Motion filed under Federal Rule of Civil Procedure 60(b)(6) for Relief from Final Judgment Order Denying 28 U.S.C. § 2254 Motion to Vacate, Set Aside, or Correct (D.E. 14) is **DENIED** and all pending motions are **DENIED AS MOOT**.

**DONE AND ORDERED** in Chambers at Miami, Florida this 7th day of July, 2009.

Joan A. Lenard

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

**Appendix "E"**

Order Denying 28 U.S.C. §2254 Motion to Vacate
(August 27, 1998)

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 97-4192-CIV-LENARD

**HECTOR RAFAEL VENDRELL,**

Petitioner,

vs.

**HARRY SINGLETARY,** et al.,

Respondents.
_____ /

**ORDER ADOPTING MAGISTRATE JUDGE'S REPORT OF JULY 14, 1998 AND DISMISSING SECTION 2254 PETITION**

**THIS CAUSE** came before the Court upon the Magistrate Judge's Report and Recommendation issued July 14, 1998.

The Court having considered the Report and the Petitioner's objections thereto, and all other matters in the record de novo consistent with 28 U.S.C.A. § 636, and otherwise advised in the premises,

it is hereby,

**ORDERED AND ADJUDGED** that the Report is

**ADOPTED IN FULL** and the petition is **DISMISSED.**

The Clerk is directed to close this case.

**DONE AND ORDERED** in Chambers at Miami, Florida, this 27th day of August, 1998.

Joan A. Lenard

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

cc: John H. Lipinski, Esq.
1455 Northwest 14th Street
Miami, Florida 33125

Roberta G. Mandel, Esq.
Office of the Attorney General
444 Brickell Avenue, Suite 950
Miami, Florida 33131

**Appendix "F"**

Magistrate's Report and Recommendation;
re: 28 U.S.C. §2254 Motion to Vacate
(July 22, 1998)

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 97-4192-CIV-LENARD

**HECTOR RAFAEL VENDRELL,**

Petitioner,

vs.

**HARRY SINGLETARY,** et al.,

Respondents.
_____ /

**REPORT AND RECOMMENDATION**

**THIS CAUSE** is before the Court on Petitioner Hector Rafael Vendrell's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2254 (D.E. 1) filed on December 16, 1997. On February 9, 1998, this matter was referred to United States Magistrate Judge Ted E. Bandstra by the Honorable Joan A. Lenard for a Report and Recommendation pursuant to 28 U.S.C. § 636(b).

Having carefully considered this motion, all responses and replies thereto, the court file and applicable law, the undersigned recommends that

Petitioner's Motion to Vacate, Set Aside or Correct Sentence be DENIED for reasons explained below.

## BACKGROUND

On October 11, 1995, a grand jury indicted petitioner on charges of first degree murder, armed burglary with an assault, and armed robbery during a home invasion occurring on July 23, 1993.

On November 22, 1995, petitioner, in exchange for the state's reduction of the charge from first degree murder to second degree murder, and in exchange for a recommended sentence of 40 years, agreed to plead guilty to second degree murder, armed burglary, armed robbery. Petitioner also waived his right to a presentence investigation report and offered his full and complete cooperation to the state including, but not limited to, a formal statement regarding his participation in the crimes.

Petitioner's proffered statement, which was the basis for his plea agreement, listed facts to which petitioner agreed in cooperating with the state. Thus petitioner agreed: (1) that petitioner and Rico Bernardo went to the Cinnamon Square Apartment Complex with the intent to commit a robbery; (2) that Rico had a gun; (3) that Rico tied up and beat the victim, pouring lamp oil on him threatening to burn him; (4) that Rico shot the victim when he attempted to escape; and (5) that although petitioner hit the victim, his participation was minimal and he concentrated on the robbery. Based upon those facts as read into the record, the state offered the plea in

exchange for petitioner's cooperation in testifying against his codefendant, Rico Bernardo.

Additional conditions of the plea agreement specified that the statements made by petitioner were to be unconditional and truthful, offered without immunity, and that his testimony could be verified by a polygraph examination at the option of the state. The sanctions that could be imposed in the event that the state determined that petitioner was not in compliance with the plea agreement were: (1) that the sentencing portion of the plea agreement shall be voidable at the demand of the State of Florida; and (2) that the plea agreement would be vacated and the parties would be returned to their pre-agreement status. The plea agreement stated specifically that if the sentencing portion of the plea agreement was voided pursuant to the agreement, petitioner's plea of guilty would remain in effect and petitioner would be sentenced to life imprisonment for second degree murder, life imprisonment for armed robbery and life imprisonment for armed burglary, each count to run consecutive to one another.

Thereafter, judgment was entered on November 22, 1995, upon petitioner's plea of guilty to second degree murder, armed burglary with assault and armed robbery. Petitioner was sentenced to 40 years imprisonment for each crime, to run concurrently, which would initially be served in a youthful offender facility.

On December 7, 1995, a polygraph release form was executed by petitioner as a condition of the plea agreement. On December 12, 1995, polygraph examiner Robert D. Gately submitted his polygraph

test findings. In this report, Gately stated that in his opinion petitioner had significant adverse reaction indicative of deception to all of the pertinent test questions.

Shortly thereafter, on January 18, 1996, petitioner completed a second polygraph examination which led the examiner to conclude that there were very clear and consistent deceptive responses by the petitioner.

As a result of petitioner's failure to pass the polygraph examinations, as stipulated in the plea agreement, the state filed a motion, asking that the trial court to sentence the petitioner to three consecutive terms of life imprisonment. The trial court reviewed petitioner's proffered information and the contradictory proffers made by petitioner each time he was called upon to cooperate with the state pursuant to the plea agreement. The trial court found that petitioner violated the plea agreement, vacated the original sentence, and re-sentenced petitioner to three consecutive terms of natural life on each count to which he plead guilty.

Petitioner filed a notice of appeal with the Third District Court of Appeal and filed his initial brief on October 4, 1996. Petitioner specifically argued that the motion filed by the state to vacate the sentence was untimely. He furthered argued that the plea did not specifically provide for the severe sentence imposed. He also contended that his proffer, the basis of the plea and the plea contract, was not specifically contradicted by any later polygraph results.

The state responded by arguing that the trial court properly determined that petitioner was in violation of his plea agreement wherein he specifically agreed that he would cooperate by providing truthful information and testimony upon which the state could rely in prosecuting codefendant Rico Bernardo. The state further argues that petitioner had been deceptive in his original proffers of information offered to secure the plea agreement, as well as the subsequent polygraph examinations and proffers of information which were conducted to determine petitioner's truthfulness. The state argued that upon these findings, the trial court properly vacated the sentence pursuant to the plea agreement, and resentenced petitioner in accordance with the terms of the agreement.

On January 22, 1997, the Third District Court of Appeals issued a per curiam opinion affirming the trial court's order vacating petitioner's sentence and re-sentencing him to terms of natural life on each of the three counts to be served consecutive to one another.

Petitioner filed a motion for rehearing on February 5, 1997, and argued that the state's motion to vacate the plea was untimely and should not have been entertained. Petitioner also argued that a comparison of his proffer to those questions that he allegedly failed, demonstrated that those questions were not part of the proffer so that any answers to those questions should not demonstrate a violation of the proffer/plea negotiation.

The Third District Court of Appeals denied the petitioner's motion for rehearing on February 19,

1997.

On December 16, 1997, petitioner filed this Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2254 raising the issues discussed below.

## STANDARD OF REVIEW

The law is clear that a petitioner's constitutional rights are violated when the prosecution fails to keep promises made in connection with a plea bargain. See Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). The record in this case indicates that the prosecution did not violate the terms of the plea agreement. A review of the record reveals instead that the trial court properly vacated the initial sentence and resentenced petitioner in accordance with the terms of the plea agreement.

A state court's factual finding is entitled to a presumption of correctness, unless that determination "is not fairly supported by the record" as a whole. See 28 U.S.C. § 2254(d). In this case, the state argued to the Third District Court of Appeals that petitioner was the person who violated his plea agreement and, as such, the trial court properly vacated the sentence in accordance with the plea agreement. The appellate court issued a per curiam opinion affirming the lower court's order re-sentencing the petitioner in accordance with the terms of the plea agreement. Reviewing the record, the undersigned finds no error in the decisions of the trial and appellate courts. Florida Rules of Criminal Procedure specifically state

that whenever a plea agreement requires a defendant to comply with specific terms, the state may move to vacate the plea and sentence within 60 days of the defendant's noncompliance with the specific terms, and the trial court may vacate the plea and sentence upon a finding of substantial noncompliance. See Rule 3.170(g) (2), Fla.R.Crim.P. Amendments to Florida Rules of Criminal Procedure 3.170 and 3.700, 633 So.2d 1056, 1057-58 (Fla. 1994); McCoy v. state, 599 So.2d 645, 649-650 (Fla. 1992).

In this case, petitioner argues that the state was untimely in its motion to vacate the judgment. Upon review of the record, however, it is clear that the state filed its motion to enforce the plea agreement on February 23, 1996, well within 60 days of the petitioner's noncompliance with the specific terms of the plea agreement, which became known to the state following the December 7, 1995 and January 18, 1996 polygraph examinations.

Petitioner also argues that the plea agreement did not state with requisite specificity the testimony required by the agreement. Specifically, petitioner contends that if the state prosecutors and trial court expected or wanted details as to the concerns later expressed regarding the true person responsible for the murder and his veracity, they would have required that the proffer address those concerns specifically and refused to accept it or enter the plea until it did so. However, this argument is meritless in that the plea agreement is clear in requiring petitioner to be honest, truthful and forthcoming in his cooperation with the state. Additionally the plea agreement did address petitioner's alleged involvement in the crime which was later

contradicted. The record shows that petitioner initially proffered that his involvement in the charged crimes was minimal and that he was primarily interested in the robbery. Yet, at later proffers, and during the polygraph examinations, petitioner admitted that he helped beat the victim with a bat and also actually shot the victim. These contradictions are not minimal and are definitely not a truthful part of petitioner's initial proffer. Therefore, the undersigned finds that the trial court did not error in finding that petitioner was in substantial violation of his plea agreement, specifically stating that "...you lied from the get go." (T. 275).

Petitioner also argues that the plea agreement stipulates that he would be sentenced to 40 years imprisonment with consecutive terms if he failed the polygraph examination. However, the plea agreement clearly states that if petitioner withheld material information known to him concerning the subject crimes, was not truthful in his testimony, the state may exercise its option to vacate the plea and have petitioner re-sentenced to 3 consecutive life terms. See Plea Agreement ¶10. Therefore, the undersigned finds that the trial court correctly re-sentenced the petitioner as per the agreed upon plea agreement.

## CONCLUSION

The trial court properly enforced the specific terms of the plea agreement by vacating the original sentence and re-sentencing petitioner as agreed in paragraph 10 of the negotiated plea agreement. Therefore, the undersigned recommends that

Petitioner's Motion to Vacate, Set Aside or Correct Sentence be DENIED.

The parties may serve and file written objections to this Report and Recommendation with the Honorable Joan A. Lenard, United States District Judge, within 10 days of receipt. See 28 U.S.C. §636 (b) (1) (c); United States v. Warren, 687 F.2d 347, 348 (11th Cir. 1982), cert. denied, 460 U.S. 1087 (1983); and Hardin v. Wainwright, 678 F.2d 589, 592 (5th Cir. Unit B 1982); see also Thomas v. Arn, 474 U.S. 140, 153 (1985).

RESPECTFULLY SUBMITTED in Miami, Florida, this 22nd day of July, 1998.

Ted E. Bandstra
United States Magistrate Judge

cc: Honorable Joan A. Lenard
All counsel of record